91-1214

Supreme Court, U.S.
FILED
JAN 9 1992
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SUPREME COURT

TERM 1991

BROOKS V. SULPHUR SPRINGS VALLEY ELECTRIC COOPERATIVE

ON WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI

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a. The basic question raised in this case is whether the rule of *Allegheny Pittsburgh Coal Company v. County Commissioners of Webster County, West Virginia, 109 S.Ct. 633 (1989)*, i.e. that the magnitude of the burden imposed on an individual by a State law or regulation must be equal to that imposed on others similarly situated and must not be based on when the individual became subject to the burden, applies to State mandated utility rates as well as to taxes. Petitioner has been denied an answer to this question in the inferior federal courts on the grounds that the Eleventh Amendment and the Johnson Act, U.S.C. 28-1342 preclude federal jurisdiction. Petitioner raises the following questions for the Court:

1. Was *Atascadero State Hospital v. Scanlon, 105 S.Ct. 3142, (1985)* wrongly decided?

2. If *Atascadero* was decided correctly, have either or both conditions which waive sovereign immunity been met in this case?

3. Is the Johnson Act constitutional?

4. If the Johnson Act is constitutional, have all conditions required for the denial of federal jurisdiction been met in this case?

b. The caption of the case lists all interested parties.

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d. Opinions delivered by courts and state agencies relevant to this case.

1. U.S. Court of Appeals for the Ninth Circuit, Case No. 90-16113, opinion delivered on December 11, 1991.

2. U.S. District Court for Arizona, Case No. CV-89-0692-WDB, opinion delivered July 17, 1990; filed July 18, 1990.

3. Arizona Corporation Commission (Commission) Decision 56100, August 22, 1988.

4. Commission Decision No. 47042, June 14, 1976.

5. Commission Decision No. 53089, June 21, 1982.

e. Grounds on which jurisdiction of the Court is invoked.

This is an appeal from opinion number 90-16113 of the U.S. Court of

Appeals for the Ninth Circuit, filed December 11, 1991. Petitioner believes that U.S.C. 28-2106 gives this Court jurisdiction to review this judgment.

f. Constitutional provisions and statutes involved.

1.Article III, Section 2, Paragraph 1.

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws .....

2. Amendment XIV, Section 1.

> .... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

3. Article IV, Section 2, Paragraph 1.

> The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.

4. The Johnson Act, U.S.C. 28-1342.

> The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or

a rate-making body of a State political subdivision, where:

(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,

(2) The order does not interfere with interstate commerce; and,

(3) The order has been made after reasonable notice and hearing; and,

(4) A plain, speedy and efficient remedy may be had in the courts of such State.

5. Article 15, Section 12 of the Constitution of Arizona.

.... no discrimination in charges, services, or facilities shall be made between persons or places for rendering a like and contemporaneous service ...

6. Article 2, Section 3 of the Constitution of Arizona.

The Constitution of the United States is the supreme law of the land.

7. Arizona Revised Statute 40-246.

A. After any final order or decision is made by the commission, any party to the action or proceeding or the attorney general on behalf of the state may apply for a rehearing of any matter determined

in the action or proceeding and specified in the action for rehearing within twenty days of entry of the order or decision. Unless, otherwise ordered, the filing of such an application does not stay the decision or order of the commission. If the commission does not grant the application within twenty days, it is deemed denied ...

B. No claim arising from any order or decision of the commission shall accrue in any court to any party or the state unless the party or the state makes, before the effective date of the order or decision, application for a rehearing.

8. Arizona Revised Statute 40-254.

A. Any party in interest, or the attorney general on behalf of the state, being dissatisfied with any order or decision of the commission, may within thirty days after a rehearing is denied or granted, and not afterwards, commence an action in the superior court in the county in which the commission has its office, against the commission as defendants, to vacate, set aside, affirm in part, reverse in part or remand with instructions to the commission such order or decision on the ground that the valuation, rate, joint rate, toll, fare, charge or finding, rule or regulation, classification or schedule, practice, demand, requirement, an act or service provided in the order or decision is **unlawful** (emphasis added)...

9. Arizona Revised Statute 40-248.

Reparation of overcharge; action to recover overcharge; limitations.(Title)

Note from code book: "Where carrier merely collected intrastate rate authorized by the state corporation commission, commission was without authority to order reparation, though rate prescribed and charged was found excessive".

g. Concise statement of the case.

The Court of Appeals exempted the two defendants in this case from the jurisdiction of the federal courts on different grounds. The Commission was exempted on the basis of the Eleventh Amendment as interpreted in *Atascadero*. The Sulphur Springs Valley Electric Cooperative (SSVEC) on the basis of the Johnson Act, U.S.C. 28-1342.

Petitioner believes that *Atascadero* was decided incorrectly. He is not so presumptuous as to believe that he can argue that state sovereign immunity was not part of the original intent of the founders, or the framers of the Eleventh Amendment, and that it is not consistent with our federal system better than

Justices James Wilson and John Blair, drafters of Article III, in *Chisholm v Georgia, 2 Dall. 419, 1 L.Ed. 440 (1793)*; Chief Justice John Marshall in *Cohens v. Virginia, 6 Wheat. 264, 5 L.Ed. 257 (1821) and Osborn v. Bank of the United States, 9 Wheat. 738, 6 L.Ed. 204 (1824)*; or Justice Brennan in *Atascadero* itself. He asks this Court to reconsider the dissent of Justice Stevens in *Atascadero*, who found that the concept of state sovereign immunity, which originated in *Hans v. Louisiana, 134 U.S. 1, S.Ct. 504, 33 L.Ed. 842 (1890)* and was subsequently developed in other decisions, was "egregiously incorrect".

Petitioner makes three observations on the consequences of *Atascadero*.

1. Although this Court accepted *Allegheny Pittsburgh*, the inferior courts denied jurisdiction in this case, which raises the same legal question. This

appears to confirm Justice Brennan's comment in *Atascadero*:

> As a result it has been impossible to determine to what extent the principle of state accountability to the rule of law can or should be accommodated within the competing framework of state nonaccountability put into place by the Court's sovereign immunity doctrine.

If the four dissenting justices did not understand the doctrine, what hope is there for the rest of us?

2. Consider the hypothetical situation that State B has exactly the same laws as Arizona governing the regulation of utilities, but, solicitous of its citizens, waives sovereign immunity. Further, assume that this Court found the tariff disputed in this case unconstitutional. Under the reasoning of the appellate court, because of the Eleventh Amendment and the Johnson Act, a citizen of Arizona could not get similar relief from the federal courts. Is this

not a violation of Article IV, Section 2, Paragraph 1?

3. In *Atascadero, t*he Court ruled:

> .... when acting pursuant to part 5 of the Fourteenth Amendment, Congress can abrogate the Eleventh Amendment without the States' consent.

Application of this principle to the Thirteenth Amendment yields the conclusion that Congress, by the appropriate use or nonuse of part 2, can bring back slavery to the United States.

During the oral hearing before the Court of Appeals, it was assumed that the *Atascadero* doctrine was correct and petitioner presented arguments that both the State of Arizona and Congress had granted jurisdiction to the federal judiciary in this case.

The case for the waiver of sovereign immunity by the State of

Arizona comes from two decisions of the Arizona Supreme Court: *State v. Tsutomu Ikeda, 61 Ariz. 41, 143 P.2d 880 (1944)* and *Grand Canyon Airlines v. Arizona Aviation, Inc., 12 Ariz. App. 252, 469 P.2d 486 (1970)*. In the latter case, the court interpreted Article 2, Section 3 of the Constitution of Arizona:

> Effect of the supremacy clause or doctrine of federal preemption is to deprive state of jurisdiction over matters embraced by congressional acts regardless of whether state law coincides with, is complementary to, or opposes congressional expression.

This ruling should also be applied to the Johnson Act, which will be considered below.

The waiver of Eleventh Amendment immunity by Congress derives from the unqualified grant of jurisdiction to the federal courts in U.S.C. 28-1331 and U.S.C. 28-1343, as well as from the qualified grant in U.S.C. 28-1342.

The Court of Appeals refused to consider the constitutionality of the Johnson Act because the issue was not raised in the district court. To the petitioner, it makes little sense for courts to spend time on a detailed analysis of the conditions of the Johnson Act, if it is, in fact, unconstitutional. The fact that the district court decided the case by summary judgment did not give him a chance to fully develop his case.

The Johnson Act is unconstitutional by virtue of Article III, Section 2 as explained in *Marbury v. Madison, 1 Cranch,137 (1803)*:

> The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and, consequently, in some form, may be exercised over the present case, because the right claimed is given by the laws of the United States.

Petitioner also pointed out to the appellate court that the Johnson Act and U.S.C. 28-1342 are logical contradictions, as are the Johnson Act and U.S.C. 28-1343. Where there are logical contradictions in a code of laws, there is, in fact, no law. It is hoped that this Court will decide that the need for clarifying the U.S. Code takes precedence over the principle that no new points of law may be raised in the appellate process.

However, if the Court rules that the constitutionality of the Johnson Act is not subject to review, petitioner presented arguments that conditions (3) and (4) were not met in this case.

Condition (3) requires "reasonable notice and hearing". The appellate court ruled that:

> The Commission finding that "[t]he the disputed portion of SSVEC's tariff was heretofore lawfully approved and

> authorized by the Commission, *Brooks v. Sulphur Springs Elec. Coop., Ariz. Corp. Comm'n Decision 55398 at 3 (1987)*, precludes relitigation of the issue of compliance with the requirements of notice and hearing under Arizona law.

Notice and hearing are a necessary condition to preclude the jurisdiction of the federal courts; petitioner has never alleged anything about notice and hearing under Arizona law. As indicated earlier, Article 2, Section 3 of the Arizona Constitution has been interpreted by the Arizona Supreme Court " ... to deprive state of jurisdiction over matters embraced by congressional acts ...". Under Arizona law, the Commission has no authority to consider whether any federal requirement has been met.

The appellate court noted that under Arizona law, Ariz. Rev. Stat. 40-250, A.R.S. 40-367, and A.R.S. 38-431.02, there are requirements for notice and hearing under Arizona law.

Petitioner has alleged, with evidence, that there was no notice and hearing in any meaningful sense for Decisions 47042 and 53089, and that the hearing for Decision 56100 was legally flawed. Even if the federal courts accept the Arizona definition of notice and hearing as operative under the Johnson Act, it is the duty of the federal courts to make their own determination as to whether these requirements have been satisfied. To defer to the agency, whose ruling is being questioned in the federal system, is to make a nullity of the requirement. Petitioner also notes that while he disagrees, the Commission insists that only Decision 47042 applies to him,

In reference to requirement (4) of the Johnson Act, the appellate court said:

> Brooks also contends that the Johnson Act does not apply because he lacks a plain, speedy and efficient remedy in state court. This contention is without merit.

The appellate court and the defendants agree that A.R.S. 40-246(A) is the operative statute. In his written brief (pages 18-19) to the appellate court, petitioner offered arguments to show that under A.R.S. 40-246(A), it is virtually impossible for a consumer to meet the required twenty day deadline for filing for a rehearing with the Commission. Unless this condition is met, there is no access to the courts under Arizona law. Briefly, the two arguments were that it is very unusual for a consumer to learn of a Commission decision within twenty days, and, that in cases like this , where illegality is based on a new court decision, Arizona law makes no provision for bringing the

matter to the courts. As its title shows, A.R.S. 40-248 deals with appeals regarding violations of the tariff by the utility, not, as implied in the appellate ruling, with the opportunity to challenge the legality of the tariff. How can something that is virtually impossible be "plain, speedy and efficient"?

In his oral argument before the appellate court, petitioner presented absolute proof that no appeal was possible in this case. In essence, he pointed out that Decision 56100 states, "IT IS FURTHER ORDERED that this Decision shall become effective immediately", while A.R.S. 40-246(B) precludes any appeal after a decision takes effect. The attorney for the Commission volunteered the information that all decisions of the Commission have this language. However, if one refers to Decision 47213, which is part of the record, it says: "... these

rates to be effective with usage thirty (30) days after approval by the Commission."

The Court of Appeals described A.R.S. 20-246(B) as "inartfully drawn" and, by departing from the actual text, provided its own interpretation on why it does not prevent an appeal. The actual text makes such an appeal, even if granted by the Commission, unlawful.

Petitioner believes that an alternative reading, consistent with the text, is more plausible. The laws governing the Commission (as may be the Johnson Act) are predicated on the assumption that the Commission will protect the consumer against the utility, e.g. *Application of the Trico Electric Cooperative, Inc., 92 Ariz. 377 P.2d 309 (1963)*:

> Arizona is a regulated monopoly state and the monopoly is tolerated only because it will be subject to vigilant

> and continuous regulation by the corporation commission and is subject to recession, alteration, or amendment at any time on proper notice when the public interest would be served by such action.

Several years ago, the Arizona legislature recognized that the Commission was not fulfilling its protective role when it created the Residential Utility Consumers' Office to represent consumers before the Commission.

The Arizona Constitution gives utilities, but not their customers, the right to appeal Commission decisions. Therefore, one can interpret A.R.S. 40-246(B) as meaning that a utility can trade its right of appeal for an effective date for its rate increase of less than twenty days and the advantage of the preclusion of consumer appeals.

i. This case was filed in district court under U.S.C. 28-1343.

j. Petitioner has alleged obvious, flagrant, and continuing violations of the Constitutions of the United States and Arizona. No court has been willing to accept jurisdiction to evaluate these charges. In order for a society to work, laws must be understandable and enforceable; two conditions which are lacking in this case. Petitioner also believes that the inferior courts have ruled in this case in a way that conflicts with *Allegheny Pittsburgh Coal Company v. Webster Country, West Virginia.*

Petitioner filed a notice with the Court of Appeals that he intended to challenge the constitutionality of the Johnson Act, U.S.C. 28-1342. He does not know if it was certified to the Attorney General. The Court of Appeals refused to consider the question because it was not raised in district court.

Petitioner

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SIDNEY BROOKS,
Plaintiff-Appellant,

v.

SULPHUR SPRINGS VALLEY ELECTRIC COOPERATIVE; ARIZONA CORPORATION COMMISSION,
Defendants-Appellees.

No. 90-16113
D.C. No.
CV-89-0692-WDB
OPINION

Appeal from the United States District Court
for the District of Arizona
William D. Browning, District Judge, Presiding

Argued and Submitted
October 8, 1991—San Francisco, California

Filed December 11, 1991

Before: Harry Pregerson, Warren J. Ferguson and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge O'Scannlain

SUMMARY

Jurisdiction/Constitutional Law

Affirming a district court grant of summary judgment, the court of appeals held that the district court properly lacked subject matter jurisdiction under the eleventh amendment and the Johnson Act to hear appellant's claim against a service

availability charge imposed on him by an electric utility with the approval of the Arizona Corporation Commission.

Appellant Sidney Brooks filed an action in district court alleging that imposition by an electric utility of a monthly service availability charge under an existing tariff violated the Equal Protection Clause of the fourteenth amendment. The Arizona Corporation Commission had previously granted the utility a rate increase, but ordered it to amend its tariff to reduce the service availability charge. The utility, with the concurrence of the Commission, applied this charge only to extensions added after the decision. The district court held it lacked subject matter jurisdiction under the eleventh amendment and the Johnson Act.

[1] As an integral state agency, the Commission was shielded from suit by the eleventh amendment. [2] However, the electric utility was not entitled to eleventh amendment immunity since it was not a state agency, but rather an independent, non-profit public service corporation subject to regulation by the Commission. [3] Nonetheless, the court held that the Johnson Act precluded federal court jurisdiction over all suits affecting state-approved utility rates, including actions seeking declaratory relief and compensatory damages. [4] Because the state remedy was plain, speedy, and efficient within the terms of the Johnson Act, the district court lacked jurisdiction to entertain Brooks' complaint. [5] The court declined to consider Brooks' claim that the Johnson Act unconstitutionally constricts the jurisdiction of the lower federal courts, and that the statutory scheme for appealing Commission decisions offended due process, since it was not presented to the district court.

COUNSEL

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Catherine M. Stewart, Desens & Hitchcock, Bisbee, Arizona, for the defendant-appellee Sulphur Springs Valley Electric Cooperative and Janice M. Alward, Arizona Corporation Commission, Phoenix, Arizona, for the defendant-appellee Arizona Corporation Commission.

OPINION

O'SCANNLAIN, Circuit Judge:

This appeal marks the latest battle in Sidney Brooks' long-running campaign against a $6.50 monthly service availability charge imposed on him by Sulphur Springs Valley Electric Cooperative ("SSVEC") with the approval of the Arizona Corporation Commission ("the Commission"). Brooks appeals pro se from a district court order granting summary judgment in favor of SSVEC and the Commission.

I

On November 18, 1976, Brooks signed a contract with SSVEC for the extension of electric service to his home. Pursuant to the contract, SSVEC built an extension line to Brooks' home, charging Brooks a portion of the construction cost. The contract also called for a monthly service availability charge of $6.50 per month, subject to future adjustment if additional customers connected to the extension line. The service availability charge was calculated according to SSVEC's Tariff 4.17(b), which was authorized by the Commission on November 1, 1976, and reauthorized on June 21, 1982.

Brooks fired the first salvo of his campaign in 1984, when he challenged Tariff 4.17(b) in a complaint filed with the Commission. The Commission dismissed the complaint on the grounds that, under Arizona law, individual customers may not challenge the reasonableness of utility rates. *Brooks*

v. Sulphur Springs Valley Elec. Coop., Ariz. Corp. Comm'n Decision No. 54862 (1986). Undeterred, Brooks convinced twenty-four other SSVEC customers to join his complaint, and filed again. The Commission dismissed this second complaint on the merits. *Brooks v. Sulphur Springs Valley Elec. Coop.*, Ariz. Corp. Comm'n Decision No. 55398 (1987).

In 1988, when SSVEC filed an application for a rate increase, the Commission allowed Brooks to intervene. Following hearings, the Commission granted the rate increase, but ordered SSVEC to amend Tariff 4.17(b) to reduce the service availability charge. Application of Sulphur Springs Valley Elec. Coop., Ariz. Corp. Comm'n Decision No. 56100 (1988). SSVEC, with the concurrence of the Commission, applied this change only to extensions added after the decision. Four months after Decision 56100 was rendered, Brooks filed an action in Arizona Justice Court against SSVEC, contending that Decision 56100 required SSVEC to reduce his service availability charge. The Justice Court dismissed for lack of subject matter jurisdiction.

Finally, on December 26, 1989, Brooks filed the present action in federal court. In his complaint, Brooks alleged that Tariff 4.17(b) violates the Equal Protection Clause of the Fourteenth Amendment. Brooks requested that the court order SSVEC to cease charging its customers under Tariff 4.17(b) and to refund all monies collected under the Tariff. The district court granted appellees' motion for summary judgment, ruling that it lacked jurisdiction under the Eleventh Amendment and the Johnson Act. Brooks, who has represented himself throughout these proceedings, timely appealed.

II

The Eleventh Amendment prohibits federal courts from hearing suits brought against an unconsenting state. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); *Southern Pacific Transp. Co. v. City of Los Angeles*, 922 F.2d

498, 508 (9th Cir. 1990). Though its language might suggest otherwise, the Eleventh Amendment has long been construed to extend to suits brought against a state by its own citizens, as well as by citizens of other states. *Austin v. State Indus. Ins. Sys.*, 939 F.2d 676, 677 (9th Cir. 1991); *Papasan v. Allain*, 478 U.S. 265, 276 (1986); *Hans v. Louisiana*, 134 U.S. 1, 15 (1890). The Eleventh Amendment's jurisdictional bar covers suits naming state agencies and departments as defendants, and applies whether the relief sought is legal or equitable in nature.[1] *Pennhurst*, 465 U.S. at 100.

[1] The test employed in this circuit for determining if a state agency is immune from suit under the Eleventh Amendment was announced in *Mitchell v. Los Angeles Community College Dist.*, 861 F.2d 198, 201 (9th Cir.), *cert. denied*, 490 U.S. 1081 (1989). The Commission clearly meets this test. A money judgment against the Commission would be satisfied out of state funds. *See* Ariz. Rev. Stat. Ann. §§ 40-108, 40-109. The Commission performs central governmental functions, *see* Ariz. const. art. XV, and is authorized to undertake enforcement actions in the name of the state, *see* Ariz. Rev. Stat. Ann. § 40-422 (1985). The Commission does not have independent corporate status or the power to take property in its own name. As an integral state agency, the Commission is shielded from suit by the Eleventh Amendment. We therefore affirm the grant of summary judgment in favor of the Commission.

[2] SSVEC, however, is not entitled to Eleventh Amendment immunity. SSVEC is not a state agency; rather, it is an independent, non-profit public service corporation subject to regulation by the Commission. None of the *Mitchell* factors weighs in favor of granting SSVEC immunity. A damage award against SSVEC would not be paid from the state trea-

[1] In some circumstances, suits may be brought against individual state officers. *See Edelman v. Jordan*, 415 U.S. 651 (1974). Brooks has not, however, named any individual defendants.

sury. SSVEC performs no essential governmental function, has independent corporate status, may sue and be sued in its own name, and may take and hold property in its own name. *See* Ariz. Rev. Stat. Ann. § 10-757 (1990). The Eleventh Amendment does not bar the claim against SSVEC.

III

A

The district court also held that it lacked jurisdiction under the Johnson Act, which provides:

> The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:
>
> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
>
> (2) The order does not interfere with interstate commerce; and,
>
> (3) The order has been made after reasonable notice and hearing; and,
>
> (4) A plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1342 (1988).

The Ninth Circuit has never directly confronted the question of the Johnson Act's applicability to actions for declaratory relief or compensatory damages. Several other circuits have broadly construed the Act's jurisdictional bar "to oust

federal courts of jurisdiction over all challenges affecting rates." *Miller v. New York State Pub. Serv. Comm'n*, 807 F.2d 28, 31 (2d Cir. 1986). *See also Hanna Mining Co. v. Minnesota Power & Light Co.*, 739 F.2d 1368, 1370 (8th Cir. 1984); *Tennyson v. Gas Serv. Co.*, 506 F.2d 1135, 1139 (10th Cir. 1974). No circuit court of appeals has held the Act inapplicable to actions affecting state-approved rates when the relief sought is declaratory or compensatory, rather than injunctive.

The legislative history of the Act supports a broad interpretation. *See Miller*, 807 F.2d at 32-33. Although the primary evil the Act sought to remedy was the issuance of injunctions by federal courts against enforcement of state rate orders, legislators were also more generally concerned with protecting the authority of states "to perform their proper functions in the supervision and fixing of rates, without interference of Federal law." 78 Cong. Rec. 8324 (1934) (statement of Rep. Mapes). *See also id.* at 8331 (statement of Rep. Hughes) ("It is vitally important . . . that a State in its governmental proceedings, in these controls, be free from interference from the Federal Government upon the grounds of violation of the provisions of the Federal Constitution until the final action of the State, through its highest judicial tribunal, demonstrates an appeal to Federal power for the protection of a constitutional right is necessary."). Legislators on both sides of the debate spoke of the Act as completely withdrawing rate cases from federal jurisdiction. *See id.* at 8328 (statement of Rep. Lewis); *id.* at 8340 (statement of Rep. Cochran).

Furthermore, allowing federal courts to hear actions for non-injunctive relief in state rate cases would "render the [Johnson Act] a nullity." *Miller*, 807 F.2d at 33. Disgruntled rate-payers could march into state court armed with a federal judgment granting declaratory relief or monetary damages and, using the doctrine of collateral estoppel, demand injunctive relief. Congress did not intend to withdraw from federal courts the power to enjoin state rate orders directly but leave undisturbed the power to do so indirectly.

[3] We therefore agree with the other circuits that have considered this issue. We hold that the Johnson Act precludes federal court jurisdiction over all suits affecting state-approved utility rates, including actions seeking declaratory relief and compensatory damages.

B

All four conditions specified in the statute must be met for the Johnson Act to deprive federal courts of jurisdiction. *Hawaiian Tel. Co. v. Public Utils. Comm'n*, 827 F.2d 1264, 1273 (9th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988). The first two conditions are clearly satisfied. Brooks challenges the Tariff solely on the grounds of repugnance to the Constitution. No one contends that the Tariff interferes with interstate commerce. Brooks argues that the third and fourth conditions of the Johnson Act are not satisfied because the challenged tariff was adopted without reasonable notice and hearing and the Arizona courts do not provide an adequate remedy.

Brooks first contends that Tariff 4.17(b) was adopted without adequate notice and hearing. Arizona law requires the Commission to hold a hearing before approving any rate change. Ariz. Rev. Stat. Ann. § 40-250 (1985). The utility seeking the change must provide thirty days notice to the Commission and the public. *Id.* § 40-367. Notice must also be provided to the public of all Commission meetings. *Id.* § 38-431.02. These provisions, if complied with, satisfy the Johnson Act's requirement of reasonable notice and hearing.

The Commission's finding that "[t]he disputed portion of SSVEC's Tariff was heretofore lawfully approved and authorized by the Commission," *Brooks v. Sulphur Springs Elec. Coop.*, Ariz. Corp. Comm'n Decision 55398 at 3 (1987), precludes relitigation of the issue of compliance with the requirements of notice and hearing under Arizona law. In the absence of an indication of contrary congressional intent, fed-

eral courts should generally give adjudicative findings of fact of state administrative agencies the same preclusive effect they would have in the courts of the state, provided the parties had an adequate opportunity to litigate before the administrative body. *Astoria Fed. Sav. & Loan Ass'n v. Solimino,* 111 S. Ct. 2166, 2169 (1991); *University of Tennessee v. Elliott,* 478 U.S. 788, 799 (1986). The Commission's decisions are given preclusive effect in Arizona courts unless the statutory procedure for obtaining judicial review is followed. *Arizona Pub. Serv. Co. v. Southern Union Gas Co.,* 265 P.2d 435, 438 (1954). The Johnson Act contains no suggestion that state administrative decisions do not deserve preclusive effect. Quite the contrary, the Johnson Act was premised on the notion that disputes concerning local utility rates are most appropriately resolved by state administrative agencies. Therefore, we hold that Brooks is precluded by the Commission's finding from contesting compliance with statutorily-mandated procedures in the adoption of Tariff 4.17(b).

Brooks also contends that the Johnson Act does not apply because he lacks a plain, speedy and efficient remedy in state court. This contention is without merit. In order to qualify as "plain, speedy, and efficient," the state remedy need only meet certain minimum procedural requirements. *See Rosewell v. LaSalle Nat'l Bank,* 450 U.S. 503, 512-514 (1981) (construing the "plain, speedy, and efficient" state remedy requirement of the Tax Injunction Act, 28 U.S.C. § 1341, which was modeled after the identical language in the Johnson Act). To be "plain" the state remedy must not be uncertain or unclear. *Id.* at 517. To be "speedy" it must not entail significantly greater delay than a corresponding procedure in federal court. *See id.* at 519-21. To be "efficient" it must not require "ineffectual activity or an unnecessary expenditure of time or energy." *Id.* at 518.

Arizona law provides ample opportunity for aggrieved persons to challenge utility rates and Commission decisions. Customers may complain to the Commission that the rates

charged by a public service corporation violate "any provision of law or any order or rule of the commission." Ariz. Rev. Stat. Ann. § 40-246(A) (1985). A complaint challenging rates as excessive or discriminatory must be filed within two years of accrual of the cause of action. *Id.* § 40-248(B) (1985). A party dissatisfied with a Commission decision may apply for rehearing within twenty days of entry of the decision. *Id.* § 40-253(A). Within thirty days of rehearing or denial of rehearing, the aggrieved party may file an action for judicial review of the decision. *Id.* § 40-254(A). Actions properly brought before the state courts are given precedence over all other civil matters except election actions. *Id.* § 40-255. The Arizona courts, in such proceedings, can hear and resolve any claim that a Commission decision or order offends the federal constitution. *See, e.g., Pine-Strawberry Improvement Ass'n v. Arizona Corp. Comm'n,* 732 P.2d 230 (Ariz. App. 1986); *State ex rel. Corbin v. Arizona Corp. Comm'n,* 693 P.2d 362 (Ariz. App. 1984). A state remedy that provides the opportunity for a full hearing and judicial determination of all constitutional claims satisfies the requirements of the Johnson Act. *Cf. Rosewell,* 450 U.S. at 514.

Other courts have held similar schemes, requiring complaint in the first instance to the state commission and setting a short statute of limitations for seeking subsequent judicial review, adequate to satisfy the Johnson Act. *Tennyson,* 506 F.2d at 1141-42; *Mountain States Tel. & Tel. v. Public Util. Comm'n,* 345 F. Supp. 80, 83 (D. Colo. 1972) (three-judge court). Arizona's scheme was held insufficient to preclude federal jurisdiction in *Mountain States Telephone & Telegraph v. Arizona Corporation Commission,* 331 F. Supp. 1167 (D. Ariz. 1971) (three-judge court). Mountain States sought an injunction against enforcement of a Commission decision pending judicial resolution of the dispute. Because Arizona law would not permit an interlocutory injunction, the court held the state court remedy inadequate. *Id.* at 1169; *see also Mountain States Power Co. v. Public Serv. Comm'n,* 299 U.S. 167, 169-70 (1936). We doubt that the reasoning in

Mountain States comports with *Rosewell*, but in any case it does not apply here, as Brooks has not sought any remedy that the Arizona courts lack power to grant.

Brooks claimed at oral argument that the state court remedy was inadequate because the Commission decisions he seeks to challenge became effective immediately upon issuance. Arizona law provides that "[n]o claim arising from any order or decision of the commission shall accrue in any court to any party or the state unless the party or the state makes, *before the effective date of the order or decision*, application to the commission for a rehearing." Ariz. Rev. Stat. Ann. § 40-253(B) (1985) (emphasis added). Brooks argues that this statute foreclosed all possibility of judicial review of these decisions in Arizona court. We disagree.

Although the statute in question is inartfully drafted, it is clear in context that the effective date referred to is the date by which an application for rehearing must be made. The right of any party to seek rehearing of "any final order or decision . . . within twenty days of entry of the order or decision" is plainly set out in section 40-253(A). The date the decision takes effect is immaterial for this purpose. Equally plain is section 40-254(A), which allows "[a]ny party . . . dissatisfied with any order or decision of the commission" to commence an action in Superior Court "within thirty days after rehearing is denied or granted." When the Commission stated that its decisions were effective immediately, it meant that they would take effect directly, not that an application for rehearing would not be entertained. Brooks has presented no evidence that either the Commission or the Arizona courts have ever denied review on the basis that the decision was effective immediately and no application for rehearing was made before this effective date. In the absence of any such evidence, section 40-253(B) does not make the state remedy uncertain.

[4] In sum, because the state remedy is plain, speedy, and efficient within the terms of the Johnson Act, the district court

lacked jurisdiction to entertain Brooks' complaint. The district court properly granted summary judgment in favor of both defendants on this ground.

IV

[5] Brooks raises two new arguments on appeal. He contends that the Johnson Act unconstitutionally constricts the jurisdiction of the lower federal courts, and that the statutory scheme for appealing Commission decisions offends due process. We decline to consider these claims, as Brooks failed to present them to the district court. *See Brogan v. San Mateo County*, 901 F.2d 762, 765 (9th Cir. 1990).

V

Appellees seek to recover their attorney's fees on appeal. This court has discretion to award attorney's fees and single or double costs when an appeal is frivolous. Fed. R. App. P. 38; *Glanzman v. Uniroyal, Inc.*, 892 F.2d 58, 61 (9th Cir. 1989). A frivolous appeal is one in which the result is obvious or the appellant's arguments are wholly without merit. *Id.* Because this appeal was not frivolous, appellees are not entitled to an award of fees.

VI

Under the Eleventh Amendment, the district court lacked jurisdiction to hear Brooks' claim against the Commission. The Johnson Act precluded the district court from entertaining Brooks' claim against SSVEC.

AFFIRMED.

Supreme Court, U.S.
FILED
FEB 25 1992
OFFICE OF THE CLERK

91-1214

No. 90-16113

In The

Supreme Court of the United States

October Term, 1991

SIDNEY BROOKS,

Petitioner,

vs.

SULPHUR SPRINGS VALLEY ELECTRIC COOPERATIVE, INC. and ARIZONA CORPORATION COMMISSION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Ninth Circuit Court of Appeals properly affirm the district court's grant of summary judgment dismissing Sidney Brooks' complaint against the Arizona Corporation Commission and the Sulphur Springs Electric Cooperative for lack of subject matter jurisdiction, and find that the Commission was cloaked with immunity under the Eleventh Amendment and both the Commission and the Cooperative were shielded from the suit under the Johnson Act?

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner Sidney Brooks is a customer of respondent Sulphur Springs Electric Cooperative, which is regulated by the state's public service commission, respondent Arizona Corporation

Commission. Mr. Brooks was dissatisfied with the rates set by the Commission and charged by the Cooperative for an extension of service to Mr. Brooks' home located in the Cooperative's service territory in southern Arizona. He sought and received Commission review of the rates through a complaint proceeding in 1987 and participated in the Cooperative's most recent rate setting hearing as an intervenor in 1988. Mr. Brooks did not timely appeal the Commission's orders in these cases to the Arizona superior court as provided by Arizona statutes. However, Mr. Brooks filed an untimely action in an Arizona justice court to protest the rates. The justice court suit was dismissed for want of jurisdiction.

More than a year after the Commission entered its rate order and two years after the Commission's order in the complaint proceeding, Mr. Brooks filed a complaint in the United States District Court for the District of Arizona against the respondents, protesting the Cooperative's rates. That court granted summary judgment in favor of respondents and dismissed the complaint against the Commission and the Cooperative, citing lack of subject matter jurisdiction under the Eleventh Amendment and the Johnson Act, 28 U.S.C. § 1342.

Mr. Brooks appealed the district court's decision to the United States Court of Appeals for the Ninth Circuit. That court affirmed the dismissal of Mr. Brooks' complaint by the district court below. In its opinion, the Ninth Circuit found that the district court lacked jurisdiction because the Eleventh Amendment provided the Commission immunity from suit as a state agency; and, the Johnson Act's application to the complaint shielded both the Commission and the Cooperative from the action in federal court because Mr. Brooks' suit involved a claim for declaratory relief and compensatory damages related to state-approved utility rates that were subject to review under a plain, speedy and efficient state remedy.

REASONS FOR DENYING THE WRIT

The Court should deny Mr. Brooks' petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Mr. Brooks has not stated any reason why the opinion of the Ninth Circuit Court of Appeals is not in accord with other decisions of this Court or the decisions of other federal courts of appeal. Further, the Ninth Circuit's opinion in this case does not decide any new issue of federal law.

Mr. Brooks sets forth four questions for review. None present a basis for a writ of certiorari.

Question One: Was *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985) wrongly decided?

The Court's opinion in *Atascadero* is in accord with a long line of decisions by this Court involving the Eleventh Amendment, beginning with *Hans v. Louisiana,* 134 U.S. 1, 10 S. Ct. 504 (1890). The Eleventh Amendment bars suits in federal court brought against a state, and *Atascadero* held that any waiver of that immunity must be clearly expressed. In this matter, Mr. Brooks has never advanced any argument that this immunity had been waived. Fundamentally, Mr. Brooks misunderstood the federal court's jurisdiction. As such, he has relied upon the arguments set forth in the dissent in *Atascadero* without relevant discussion or application to this case. Further, Mr. Brooks advances no rule or reason to revisit *Hans.*

Question Two: If *Atascadero* was decided correctly, have either or both conditions which waive sovereign immunity been met in this case?

Again, Mr. Brooks, by his question, fundamentally

misapprehends the jurisdiction of the federal courts. *Atascadero* decided that any waiver of immunity must be clearly set forth by an act of Congress. Mr. Brooks has never asserted that there is an act of Congress which waives the immunity of the Arizona Corporation Commission from suit in federal court.

Mr. Brooks' sole argument is that the Arizona Corporation Commission cannot be granted immunity because it is not in fact the State of Arizona. The Court of Appeals found that the Commission was an integral state agency and has immunity from Mr. Brooks' complaint by application of the test in *Mitchell v. Los Angeles Community College Dist.*, 861 F.2d 198 (9th Cir. 1989), *cert. denied,* 490 U.S. 1081, 109 S. Ct. 2102, 104 L. Ed. 2d 663 (1989). The *Mitchell* decision is in accord with opinions from this court and other circuits on this issue. *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 690 n.55, 98 S. Ct. 2018, 2035 n.55, 56 L. Ed. 2d 611 (1978); *Tuveson v. Florida Governor's Council on Indian Affairs, Inc.*, 734 F.2d 730 (11th Cir. 1984).

Question Three: Is the Johnson Act constitutional?

This issue was not presented to the district court. Mr. Brooks cannot raise it now. *See Brogan v. San Mateo County,* 901 F.2d 762, 765 (9th Cir. 1990).

Question Four: If the Johnson Act is constitutional, have all conditions required for the denial of federal jurisdiction under the Johnson Act been met in this case?

The Johnson Act imposes four conditions for reservation of jurisdiction in the state courts for issues concerning utility rates. The Ninth Circuit found that all four conditions had been met in this instance. Of particular interest was the court's discussion concerning whether petitioner has a plain, speedy and efficient

remedy in the state court. The Court of Appeals analyzed the state remedy and found that it met this test.

Although petitioner also argued that the state system violated due process, this issue was not presented to the district court and has not been preserved for review by this Court. *Brogan v. San Mateo County,* 901 F.2d at 765.

The Ninth Circuit Court of Appeals analysis of the Johnson Act is in accord with other circuits. *Miller v. New York State Pub. Serv. Comm'n,* 807 F.2d 28 (2d Cir. 1986); *Hanna Mining Co. v. Minnesota Power and Light Co.,* 739 F.2d 1368 (8th Cir. 1984); *Tennyson v. Gas Serv. Co.,* 506 F.2d 1135 (10th Cir. 1974). Further, the Court of Appeals appropriately applied the standard set forth by this Court in *Rosewell v. LaSalle Nat'l Bank,* 450 U.S. 503, 101 S. Ct. 1221, 67 L. Ed. 2d 464 (1981).

CONCLUSION

Finally, the opinion of the Ninth Circuit simply makes good sense. Mr. Brooks had a remedy in the Arizona courts. The policies embodied in the Johnson Act and this Court's evolving concept of federalism, *see, e.g., Zinermon v. Burch,* 494 U.S. 113, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990), requires that the petitioner seek his remedy there. Accordingly, both the district court and the Ninth Circuit Court of Appeals were correct in finding that the district court lacked subject matter jurisdiction over Mr. Brooks' complaint under the Johnson Act. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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